No. 89-700

In The

Supreme Court of the United States

October Term 1989

ASTROLINE COMMUNICATIONS COMPANY, Limited Partnership,

Petitioner,

v.

SHURBERG BROADCASTING OF HARTFORD, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF AMICUS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of respondent, Shurberg Broadcasting of Hartford, Inc. (Shurberg). Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

Amicus is submitting this brief because it believes its public policy perspective and litigation experience opposing race-based decisions by government entities will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution. Amicus believes the lower court's opinion correctly declared the "minority distress sale" policy of the Federal Communications Commission (FCC) to be unconstitutional reverse discrimination because it is not narrowly tailored to remedy past discrimination or to promote program diversity.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 876 F.2d 902 (D.C. Cir. 1989).

STATEMENT OF THE CASE

This case presents the issue of whether the equal protection component of the Fifth Amendment to the United States Constitution tolerates race preferences in the "minority distress sale" policy of FCC.

The issue arose when FCC designated Faith Center's renewal application for noncomparative hearing. This activated Faith Center's interest in making a distress sale,[1] but it failed in two attempts. Shurberg then filed a petition with FCC requesting that its permit application be designated for a comparative hearing with Faith Center's renewal application. Before FCC had a chance to act on Shurberg's petition, Faith Center again petitioned FCC to approve a distress sale to Astroline. Shurberg objected to the Faith Center/Astroline distress sale application.

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[1] In 1978 FCC adopted a distress sale program. It permits licensees whose licenses have been designated for revocation hearing, or whose renewal applications have been designated for hearing on basic qualification issues, to transfer or assign their licenses at a discounted "distress sale" price to applicants with significant minority ownership interest. Minority includes American Indians, Alaskan Natives, Asians, Pacific Islanders, Blacks, and Hispanics. 47 U.S.C. § 309(i)(3)(C). Originally, purchasers could qualify for the distress sale program if a minority owned more than 50%, or controlling, interest in the purchasing entity. In 1982, FCC extended eligibility for the program to limited partnerships in which the general partner was a member of a minority group, and owned at least 20% of the broadcasting entity. The sale price could not be more than 75% of the fair market value. *See In re Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849 (1982).

FCC rejected Shurberg's argument that the distress sale policy violated nonminorities' constitutional right to equal protection as "without merit." FCC based its conclusions on "its findings of 'underrepresentation' of minorities in the broadcast industry and its view that increased minority ownership would increase programming diversity." 876 F.2d at 906. FCC also stated that the 1982 amendments to the Communications Act in which Congress had approved the use of a lottery system that incorporated significant preferences for minority applicants supported its distress sale policy.

Shurberg filed a petition for review. Before the Court of Appeals had an opportunity to render its decision, FCC advised the full District of Columbia Circuit, sitting *en banc*, in *Steele v. Federal Communications Commission*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated* (Oct. 31, 1985), that it wished to review its minority and female preference policies. The court remanded *Steele*. The record in this case was remanded for the same purpose.

While FCC was investigating its policies, Congress enacted the 1988 Appropriations Act which contained the funding for FCC for fiscal year 1988. It forbade FCC to repeal or alter the distress sale program. Joint Resolution, Continuing Appropriations, Fiscal Year 1988, Pub. L. No. 100-202, 101 Stat. 1329 (1987). Congress extended this policy through fiscal year 1989.

FCC abandoned its investigation and a divided Court of Appeal correctly found FCC's minority distress sale policy to be unconstitutional.

SUMMARY OF ARGUMENT

FCC's minority distress sale policy classifies on the basis of race and is therefore constitutionally suspect. A racial classification whether adopted by the federal government, state, or local government, should be subject to the same exacting standard: the strict scrutiny test. A strict scrutiny standard requires that the racial classification be "narrowly tailored" to achieve a "compelling governmental interest." It provides enhanced protection against the unfocused use of blunt, race-based devices.

Remedying the effects of identified present or past racial discrimination is the only sufficiently compelling justification for a racial classification. That justification is clearly lacking here. The evidence reviewed by Congress is insufficient to justify a race-conscious relief.

Because there is no finding of prior discrimination in the broadcast industry, the race-based preference policy must be justified by some other compelling governmental interest. FCC asserts that the distress sale policy promotes diversity of programming. But this Court has never held that program diversity is a sufficiently compelling justification for the government to use a race-based remedy. The notion that race is a valid factor for programming choices is precisely the type of racial stereotyping that is anathema to basic constitutional principles.

Moreover, even if this Court could find FCC's minority distress sale policy goal important enough to warrant use of a race classification, it is not narrowly tailored. The minority preference applied by FCC in its distress sale policy is clearly inconsistent with a society dedicated to equal opportunities.

ARGUMENT

I

ALL RACE CLASSIFICATIONS SHOULD BE SUBJECT TO THE SAME EXACTING STRICT SCRUTINY STANDARD

This case involves the issue of whether the minority distress sale policy of FCC violates the implied equal protection guarantee of the Fifth Amendment. As discussed below, this policy classifies on the basis of race and is therefore constitutionally suspect. It is amicus' position that all race classifications whether adopted by the federal government, a state, or local government should be subject to the same exacting standards of the strict scrutiny test.

A. Strict Scrutiny Standard Should Be Used When Examining All Race-Conscious Programs

The strict scrutiny standard has been traditionally used when examining "suspect" classifications based on race or national origin. The purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the governmental body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen " 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *City of Richmond v. J. A. Croson Company*, 488 U.S. ___, 102 L. Ed. 2d 854, 881-82 (1989) (plurality opinion of O'Connor, J.).

As Justice O'Connor explained:

> "Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." 102 L. Ed. 2d at 881-82; *see also Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (plurality opinion).

The strict scrutiny analysis requires the satisfaction of two prongs. The first prong focuses on the asserted compelling governmental interest supporting the racial classification. This requires the court to identify the interest and then determine whether there are sufficient facts or evidence to support that interest. The second prong focuses on whether a racial classification is narrowly tailored to promote the compelling governmental interest. This requires a determination that alternative race-neutral remedies were considered before resorting to a race-conscious measure and that the racial preference is limited to those who in fact have suffered past discrimination. *Wygant*, 476 U.S. at 267, 274, 285; *Croson*, 102 L. Ed. 2d at 881-82 (plurality opinion). *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.); *Fullilove v. Klutznick*, 448 U.S. 448, 463-67 (1980) (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring).

In *Korematsu v. United States*, 323 U.S. 214, 216 (1944), this Court first articulated that all racial classifications are suspect and must be subject "to the most rigid scrutiny." 323 U.S. at 216. This Court has not swayed from this standard of review when confronted with a classification

based on race. In *Wygant* this Court stated: "Racial, and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." 476 U.S. at 273 (quoting *Bakke*, 438 U.S. at 291 (opinion of Powell, J., joined by White, J.)). Just last term in *Croson*, a majority of this Court held that state and local government race-based programs are suspect classifications subject to strict scrutiny by the courts. 102 L. Ed. 2d at 882 (plurality opinion of Justice O'Connor, joined by Justices White, Kennedy, and the Chief Justice, and opinion of Scalia, J., concurring at 899).

The distress sale program at issue here allows a licensee whose license is in jeopardy due to a renewal or revocation proceeding to sell the station at up to 75% of market value to a minority owned or minority controlled purchaser. The distress sale program is plainly limited to American Indians, Alaskan Natives, Asians, Pacific Islanders, Blacks, and Hispanics. 47 U.S.C. § 309(i)(3)(C). Because this policy classifies on the basis of race it is constitutionally suspect.

B. Race Classifications by the Federal Government Should Be Examined Under the Strict Scrutiny Standard

Although the Equal Protection Clause of the Fourteenth Amendment applies only to the states, the equal protection analysis under the Fifth Amendment is generally the same. Amicus believes that the same analysis should apply to all race-conscious programs regardless of whether a constitutional challenge is brought under the

Fifth Amendment due process guarantee or the Fourteenth Amendment equal protection guarantee.

In *Bolling v. Sharpe*, 347 U.S. 497 (1954), this Court invalidated segregation of public schools in the District of Columbia finding that racial segregation violates the Due Process Clause. In doing so, the opinion explained the relationship of the Fifth and Fourteenth Amendments:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process." 347 U.S. at 499.

In *Weinberger v. Wissenfeld*, 420 U.S. 636 (1975), this Court reaffirmed: "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to the equal protection claims under the Fourteenth Amendment." *Id.* at 638 n.2. This Court in *United States v. Paradise*, 480 U.S. 149 (1987), stated: "Because the reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth, we need not decide whether the race-conscious relief ordered in this case would violate the former as well as the latter constitutional provision." 480 U.S. at 166 n.16.

The guaranty of equal protection prohibits the government from discriminating between individuals or groups on an illicit basis. When an individual is being penalized because of his or her race, it matters little whether the racial classification is promoted by the federal government, a state, or a local government. A strict scrutiny standard of review for all racial classifications would be in complete harmony with the goal of a color-blind society free from racial bias.

II

THE DISTRESS SALE POLICY DOES NOT REMEDY THE EFFECTS OF IDENTIFIED PRESENT OR PAST RACIAL DISCRIMINATION

Remedying the effects of identified past or present racial discrimination is the only interest this Court has identified as being sufficiently compelling to justify a race-based plan. This requires a race-conscious plan to contain factual predicates that identify past or present discrimination sufficient to establish a compelling governmental interest. *Croson*, 102 L. Ed. 2d at 889.

The distress sale policy at issue here is designed to promote minority ownership of broadcast facilities. It does not suffice to justify a race-based preference policy.

FCC has cited congressional statements that minority underrepresentation was the result of past discrimination. 876 F.2d at 913-14. These statements include a 1982 amendment to the Communications Act which authorizes FCC to award licenses under a random selection system

and to utilize a lottery in place of the comparative hearing process. By its own terms, this provision does not address the distress sale policy. 47 U.S.C. § 309(i)(3)(A).

Additionally, the conference committee report accompanying this act suggested that minority underrepresentation in broadcasting is merely part of the larger phenomenon of minority underrepresentation. It acknowledged that Congress was aware that minorities "traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43 (1982). This committee report hardly expresses congressional endorsement for a racial classification.

The only other congressional action which allegedly shows congressional approval is a 1987 appropriation rider which contained funding for fiscal year 1988. It contained language directing FCC to reinstate prior policy with respect to granting minority preferences. Pub. L. No. 100-202, 101 Stat. 1329. It is not based on any specific record regarding FCC's distress sale policy. By its terms, it does not charge FCC with any remedial duties or make findings of past discrimination affecting the broadcast industry.

The sparse legislative history relied upon by FCC cannot be regarded as sufficient evidence of congressional findings of past or present discrimination to justify a race-conscious relief. Moreover, these actions taken by Congress were passed years after the distress sale policy was in place.

Moreover, any reliance on *Fullilove v. Klutznick*, 448 U.S. 448, is misplaced. In *Fullilove*, a fragmented

Court examined racial classifications imposed by Congress. This Court discussed the equal protection standard of review applicable to congressional race-based remedial measures enforced against the states and the degree to which Congress may exercise its unique remedial powers under Section 5 of the Fourteenth Amendment. 448 U.S. at 472-92 (Burger, C.J., writing for the plurality).

Unlike *Fullilove*, FCC's preference classification is a federal agency's response to judicial directions[2] and is not attributable to any congressional action taken pursuant to Section 5 of the Fourteenth Amendment. Section 5 is "a positive grant of legislative power authorizing *Congress* to exercise its discretion in determining whether and what legislation is needed to secure the guarantee of the Fourteenth Amendment." *Croson*, 102 L. Ed. 2d at 879 (emphasis added) (quoting *Katzenbach v. Morgan*, 348 U.S. 641, 651 (1966)). Since the reasons identified in *Croson* and *Fullilove* for giving greater deference to a congressional determination of a compelling need for a racial classification apply uniquely to Congress, there is no basis for giving similar deference to a federal governmental agency.

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[2] In 1973, the Court of Appeals encouraged FCC to give preferential treatment to minority applicants. *TV 9, Inc. v. Federal Communications Commission*, 495 F.2d 929 (D.C. Cir. 1973). *Accord Garrett v. Federal Communications Commission*, 513 F.2d 1056 (D.C. Cir. 1975). Accordingly, FCC adopted several programs to increase minority ownership and participation in the broadcast industry. It implemented the minority preferences in the comparative hearing process, making the distress sales policy available only to minority purchasers, and a policy of affording tax certificates to sellers of media properties where the purchaser is minority-owned or minority controlled. 92 F.C.C.2d 840-50.

Further, *Fullilove* indicates that Congress will not resort to a race-based remedial measure in a vacuum. The plurality opinion noted that the minority preference program was within Congress' power only after the justices had looked to a variety of congressional reports, hearings, and legislation relating to the problems of minority business enterprises. 448 U.S. at 477-78. Justice Powell similarly concluded that Congress must have "made findings adequate to support its determination that minority contractors have suffered extensive discrimination." *Id.* at 502.

Here, Congress is not redressing any perceived discrimination by the states or local government. Additionally, Congress did not possess any evidence remotely identifying any discrimination by FCC or in the broadcast industry generally. Unlike *Fullilove*, the legislative record here articulates no basis for a finding that Congress had sufficient evidence before it to justify race-conscious relief. "None of these 'findings,' singly or together, provide the [FCC] with a 'strong basis in evidence for its conclusion that remedial action was necessary.' There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in [the broadcast industry.]" *Croson*, 102 L. Ed. 2d at 886. Absent a finding of past discrimination, the first prong of the constitutional test is not satisfied.

III

PROGRAM DIVERSITY IS NOT A SUFFICIENTLY COMPELLING JUSTIFICATION FOR USE OF A RACIAL CLASSIFICATION

FCC also seeks to rationalize its minority distress sale policy with the goal of promoting program diversity.

876 F.2d at 913. It contends that program diversity is a goal that in and of itself is sufficient to justify racial preferences. Statement in Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C.2d 979, 981 (1978).

Program diversity is insufficient to create a compelling governmental interest justifying a race-based policy. "Programing diversity" and the related notions of "minority" or "nonminority" programming are "elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 796-97 (1978).

Freedom of speech is prized because it informs the electorate within a democracy and helps to produce useful ideas. Diversity of programming skews the distribution of First Amendment values to one group and there is no purpose to justify the policy. This is a form of content control, forbidden by the First Amendment.

Reluctantly, the court below accepted the holding in *West Michigan Broadcasting Co. v. Federal Communications Commission*, 735 F.2d 601 (D.C. Cir. 1984), that the promotion of programming diversity is a sufficiently compelling governmental purpose to support a race-conscious policy. 876 F.2d at 920. *West Michigan* relied on Justice Powell's opinion in *Regents of the University of California v. Bakke*, 438 U.S. at 313, that FCC's program diversity goal is analogous to academic diversity. Yet the diversity interest discussed by Justice Powell in *Bakke* is much different from the program diversity advanced by FCC.

In *Bakke*, this Court struck down a university admission policy that set fixed goals for minority admission. Only Justice Powell reached the constitutional issue. Justice Powell found that the use of race as a factor in the educational admissions process for the purpose of obtaining diverse student bodies was tied to the notion of academic freedom. *Bakke*, 438 U.S. at 313. A university's First Amendment freedom to select and create its own diverse student body was deemed important for exposing students to the "atmosphere of 'speculation, experiment and creation.'" This was determined to be "essential to the quality of higher education." *Id.* at 323.

This unique academic goal does not have a counterpart in FCC's race-based preference policy. FCC's use of minority preference to further its goal of attaining diverse broadcast programming, on the First Amendment value, is based on the rationale "that the widest possible dissemination of information for diverse and antagonistic sources is essential to the welfare of the public." *West Michigan*, 735 F.2d at 614 (quoting the 1965 Policy Statement, 1 F.C.C.2d at 394 n.4).

The plain meaning of the First Amendment requires the federal government to stay neutral, not to promote either diversity or conformity in the areas of programming. Furthermore, while "the widest possible dissemination of information from diverse and antagonistic sources" may be a worthy goal (*Associated Press v. United States*, 326 U.S. 1, 20 (1945)), that goal is achieved through a free marketplace of ideas and not through government fiat. *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 707 F.2d 1413 (D.C. Cir. 1983). And, the marketplace is working.

The underlying rationale for regulating the broadcast industry was the concept of scarcity because everyone cannot broadcast at the same time, same place, and on the same frequency. This rationale was frequently under attack because of the increased number of frequencies, the advent of cable, and satellite television. *See Federal Communications Commission v. League of Women Voters*, 468 U.S. 364, 376 n.11 (1984).

The scarcity doctrine has now become obsolete. In *Syracuse Peace Council v. Federal Communications Commission*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 58 U.S.L.W. 3427 (Jan. 9, 1990), the Court of Appeal affirmed FCC's determination to abandon the "fairness doctrine" because there is no longer an inadequate diversity of viewpoint in television programming. Because of the number of competing outlets available today, the market itself will generate diversity of programming. Thus, program diversity can never qualify as a compelling governmental interest because that diversity already exists.

Moreover, FCC has failed to present sufficiently compelling evidence establishing a nexus between an owner's race and program diversity. It seems that program diversity rationale requires official identification and labeling of "Black," "Hispanic," and "Aleutian" programming and viewpoints. It assumes that we can tell how a person is going to think, speak, and act solely on the basis of skin color rather than as individuals. The Court of Appeal for the District of Columbia Circuit expresses it well: "[I]t is contrary to one of our most cherished constitutional and societal principles. That principle holds that an individual's taste, beliefs, and abilities should be assessed on their own merits rather than categorizing that individual as a

member of a racial group presumed to think and behave in a particular way." *Steele v. Federal Communications Commission*, 770 F.2d at 1198. This type of racial stereotyping is an anathema to fundamental constitutional principles.

In *Wygant*, this Court stated:

> "This Court has 'consistently repudiated "[d]istinctions between citizens solely because of their ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." ' " *Wygant*, 476 U.S. at 273 (quoting *Loving v. Virginia*, 338 U.S. 1, 11 (1967)).

As Justice Powell observed in *Wygant*:

> "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over expansive." 476 U.S. at 276 (plurality opinion) (emphasis in original). *Accord Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

FCC's program diversity policy appears to be the type of racial stereotyping that the *Croson* majority identified as a preeminent danger in the use of racial classifications. *See Croson*, 102 L. Ed. 2d at 896 (Stevens, J., concurring and 102 L. Ed. 2d at 903 Scalia, J., concurring). Societal discrimination is indifferent to whether there was or is any discrimination in a particular program. Allowing this type of race-based program to stand would authorize government to introduce race into any program even where there have been no race-based barriers to minorities.

In sum, FCC has been unable to determine any factual support for its program diversity goal.

IV

THE RACE-BASED DISTRESS SALE POLICY IS NOT NARROWLY TAILORED

Even if it could be said that there is a compelling governmental interest to justify FCC's minority distress sale policy, the policy is plainly not narrowly tailored to achieve the remedial purpose. *Croson*, 102 L. Ed. 2d at 890; *Wygant*, 476 U.S. at 274; *Fullilove*, 448 U.S. at 480.

A. The Distress Sale Policy Is Not Narrowly Tailored to Remedy the Effects of Past Discrimination

The minority preference policy is not aimed at correcting the actual effects of past discrimination. *See, e.g., Croson*, 102 L. Ed. 2d at 896 (Stevens, J., concurring in part and concurring in the judgment); *Fullilove*, 448 U.S. at 480-82. The minority distress sale policy does not allow for a case-by-case inquiry into whether or not the minority purchaser seeking to use the distress sale policy has suffered from the effects of past discrimination. The opportunity to use the distress sale policy is granted to any minority purchaser whether or not it has been disadvantaged by past discrimination. As this Court found in *Croson*, it is almost impossible to determine whether a program is narrowly tailored when it is not linked to identified discrimination in any way. 102 L. Ed. 2d at 890.

Also, there has been no prior consideration of the use of race-neutral means to increase minority participation. *See Croson*, 102 L. Ed. at 890; *Fullilove*, 448 U.S. at 463-67; *id.* at 511 (Powell, J., concurring). In *Wygant*, the plurality opinion noted that the term "narrowly tailored" requires consideration of whether lawful alternatives and less restrictive means could have been used. *Wygant*, 476 U.S. at 282-84. In *Croson*, the Court noted that many of the barriers to minority business enterprises participation seemed to appear race neutral. "If MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiorari*, lead to greater minority participation." *Id.* at 890-91.

Here, the only identifiable barrier is that minorities have less capital than nonminorities. Lack of money can hardly be viewed as a barrier amounting to discrimination. It is simply one of the many nonracial factors that seem to face any group seeking to establish a new business enterprise. *See Croson*, 102 L. Ed 2d at 890-91. This type of nonracial barrier should be addressed through race-neutral means. *Id.* Yet, FCC failed to consider race-neutral means. Instead, the minority distress sale policy is a drastic race-specific preference and is not constitutionally permissible under *Croson*.

The burden of minority preference also imposes an unfair burden on innocent third parties. *See Wygant*, 476 U.S. at 282-84; *Fullilove*, 448 U.S. at 484. Unlike *Fullilove*, in which this Court found the "actual 'burden' shouldered by nonminority firms is relatively light" (448 U.S. at 484), the distress sale policy deprives a nonminority of a unique opportunity to own a broadcast

station, solely because of his race. Nonminorities need not apply.

B. The Distress Sale Policy Is Not Narrowly Tailored to Promote Program Diversity

FCC's minority distress sale policy to promote program diversity is not narrowly tailored. First, FCC has declared that program diversity already exists and is assured by the marketplace. Thus, program diversity by itself cannot justify content control. If the purpose is to give viewers diversity of viewpoint, viewpoint cannot be regulated. If it is intended only to make sure that there is an equal balance in the number of broadcast stations owned by minorities to the number of minorities in the national population, then it is discrimination.

Second, there is no record to demonstrate that the use of a race-based preference scheme to increase minority ownership is essential to achieving program diversity. *See Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic or Gender Classifications*, 1 F.C.C.Rec 1315 (1986), modified, 2 F.C.C.Rec 2377 (1987).

Third, by not considering race-neutral alternatives, FCC has increased the risk of racial stereotyping. Under FCC's program diversity rationale, it is assumed that race will determine what type of programming minority station owners will provide as well as the type of programming viewers and listeners will want. This is "the type of stereotypical analysis that is a hallmark of violations of

the Equal Protection Clause." *Croson*, 102 L. Ed. 2d at 896 (Stevens, J., concurring).

Fourth, to the extent FCC's policies are designed to correct the "underrepresentation" of certain viewpoints by awarding preferences to specific groups until true diversity is achieved, there are no set limits so that a reviewing court knows when the goal has been attained. Minority preferences could conceivably end only when the percentage of minority-owned stations is in balance with nationwide minority representation. *See Winter Park Communications, Inc. v. Federal Communications Commission*, 873 F.2d 347, 360 (D.C. Cir. 1989). FCC's minority distress sale policy is potentially "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276 (plurality opinion).

Because the distress sale policy is deficient in each and every respect, it simply cannot be said to be narrowly tailored and is therefore invalid.